MRCB BUILDERS SDN BHD v. CHINA STATE CONSTRUCTION ENGINEERING (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ALIZA SULAIMAN J
[ORIGINATING SUMMONS NO: WA-24C-53-04-2023]
7 JANUARY 2025

Abstract – *While the High Court has supervisory jurisdiction over adjudication tribunals under the Construction Industry Payment and Adjudication Act 2012, the court's intervention while an adjudication proceeding is underway is rare and must be sparingly entertained lest, it will encourage the opening of floodgates to frustrate or defeat the utility of statutory adjudication as a swift remedy for unpaid parties in the construction industry. Courts should, therefore, sparingly entertain an application for intervention to halt and terminate an adjudication proceeding before the delivery of the adjudication decision.*

CONSTRUCTION LAW: *Adjudication – Adjudication proceedings – Pending adjudication proceedings against main contractor for release of retention sum and non-certification and under-certification of value of works under contract – Main contractor filed suit to render adjudication proceedings unreasonable, oppressive and abuse of process – Application less than a month before adjudication decision – Application premised on fraud and conspiracy in claiming for payment for works not carried out – Whether fraud raised in adjudication proceedings – Whether two wholly different and contradictory defence in adjudication proceedings and this court – Whether court intervention would halt and terminate adjudication proceedings*

CONSTRUCTION LAW: *Claims – Payment claim – Pending adjudication proceedings against main contractor for release of retention sum and non-certification and under-certification of value of works under contract – Main contractor filed suit to render adjudication proceedings unreasonable, oppressive and abuse of process – Application less than a month before adjudication decision – Application premised on fraud and conspiracy in claiming for payment for works not carried out – Whether issuance of certificate of practical completion showed works approved*

JURISDICTION: *Courts – High Court – Whether court has power to prohibit progress of adjudication proceedings on jurisdictional grounds – Whether High Court has supervisory jurisdiction over adjudication tribunals – Whether jurisdiction statutorily provided – Whether adjudication proceedings brought unreasonably and oppressively – Whether court intervention while adjudication proceedings underway must be sparingly entertained – Courts of Judicature Act 1964*

The plaintiff was employed by MRCB Seputeh Land Sdn Bhd ('MRCB Land') as the main contractor for a project. The plaintiff appointed the defendant as the works package contractor for the main building works package for the project. According to the bill of quantities ('BQ') under the works package contract, among the defendant's responsibility was to install façade windows for the units in the project ('façade window works'). The façade window works included the installation of sub-frames ('sub-frame works'). In the course of carrying out the works, the defendant had submitted various progress claims to the plaintiff, including progress claims ('PC') No 17 to No 38, which were approved by the architect or quantity surveyor ('QS') of the project, Veritas and JUBM Sdn Bhd ('JUBM'), respectively. By way of interim payment certificates ('IPC') No 17 to No 38, the plaintiff remitted various sums to the defendant as consideration for, amongst others, the façade window works and sub-frame works. Subsequently, the plaintiff issued the certificate of practical completion ('CPC') certifying that the works were completed to the plaintiff's satisfaction and accordingly, possession was granted. Upon handing over of vacant possession to the unit owners, MRCB appointed Architect Centre Sdn Bhd ('ACSB') to conduct an initial building condition inspection and technical advisory on the project and ACSB and reported, *inter alia*, that the shop drawings did not show that sub-frames were installed to the windows ('first ACSB report'). There were also multiple complaints by the unit owners for various defects which, among others, included water leakage from their unit windows. Despite rectification works carried out by the defendant to resolve the issues raised in the complaints, the water leakage issue could not be resolved. Based on the second ACSB report, it was found that the cause of the persistent water leakage issue was due to the absence of sub-frames to the façade windows. Thereafter, the defendant initiated the adjudication proceedings against the plaintiff for: (i) the release of the first moiety of the retention sum pursuant to the issuance of the CPC; and (ii) the non-certification and under-certification of value of works done under the contract. The plaintiff subsequently filed Suit 125 against the defendant and its directors, premised on fraud and conspiracy *viz* the fraudulent or false claims for sub-frame works that were not carried out by the defendant, which had the effect of questioning the veracity of the progress claims. Just before the adjudicator was to deliver his decision by 2 May 2023, the plaintiff filed the applications, in encls. 1 and 2, on 6 April 2023 and raised the following questions for determination: (i) whether the adjudication proceedings was initiated by the defendant in furtherance of a fraud, thereby being oppressive and an abuse of process; (ii) whether the adjudication proceedings was unreasonable in view of the fact that the adjudication decision ('AD') arising out of it was likely to be set aside under s. 15(a) of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') or stayed under para. 16(1)(b) of the CIPAA pending disposal of Suit 125; and (iii) whether the adjudicator had no jurisdiction to determine

the adjudication proceedings, in view of the alleged fraud, Suit 125, the expert application and the SD by the QS, which had the effect of questioning the integrity of the certification process of PC No 38 and IPC No 38.

Held (dismissing plaintiff's applications in encl. 2 with cause in cause and encl. 1 with costs):

(1) The preliminary issue, as to whether the court has the power to prohibit the progress of the adjudication proceedings by a stay or setting aside the same on jurisdictional grounds, or on the ground that it was brought unreasonably and oppressively, was answered in affirmative. This is provided that a plaintiff is able to discharge the burden of proving the grounds in support of the application and the court, in the exercise of its discretion, is minded to grant declaratory or injunctive relief to the plaintiff under the CJA or the Specific Relief Act 1950. (paras 27 & 32-34)

(2) The plaintiff had not established its allegation of fraud on the balance of probabilities. The defendant was contractually required to carry out the façade windows works in accordance with the shop drawings as forwarded by the plaintiff to veritas for approval and comments and approved by Veritas. As the plaintiff itself had checked the shop drawings and Veritas had approved the same without installation of sub-frames to the façade windows, the plaintiff's contention that the defendant prepared the shop drawings with the hindsight of supporting the defendant's fraudulent acts was illogical and unacceptable. The plaintiff, by issuing the CPC, had certified that the façade windows were installed in accordance with the approved shop drawings and were completed to its satisfaction. (para 41)

(3) The non-installation of window sub-frames was never raised as an issue of fraud in the adjudication proceedings. Instead, the plaintiff characterised the issue of the façade window wall works, including the non-installation of façade window sub-frames, as defective or non-conformance works and raised the costs of rectification as a set-off against the plaintiff's claim. It was incredulous for the plaintiff to claim the water seepage issue as a defect before the adjudicator and as fraud before this court. If the applications were allowed, the court would be endorsing two wholly different and contradictory defence in the adjudication proceedings and in this court, mounted on the same subject matter, *ie*, the non-installation of sub-frames to the façade windows. Further, it would be unjust for this court to grant the declarations sought by the plaintiff when the defendant had raised many other issues and claims in the adjudication claim. (para 41)

(4) A specific remedy for fraud is provided for in s. 15(a) of the CIPAA. Hence, if the respondents, in adjudication proceedings which are pending, were allowed to easily resort to general statutory provisions to circumvent or suspend the process of adjudication instead of relying on the specific remedies provided under the CIPAA, except in a clear case of absolute lack of jurisdiction, it would defeat the purpose of the ClPAA in providing a speedy mechanism for settling payment problems in construction contracts even if this may be on a provisional interim basis. Further, sub-s. 37(1) of the CIPAA provides that a dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court. However, the allegation of fraud was raised in this suit, 11 months after the purported discovery of fraud, and less than one month prior to the due date for the delivery of the AD. Court intervention to halt and terminate the adjudication proceedings before the delivery of the AD must be sparingly entertained. (para 42)

(5) The second and third issues were predicated on a finding that the plaintiff had proven a *prima facie* case of fraud. In the light of the findings of the court in relation to the first issue, primarily that the plaintiff's allegation of fraud had not been established, there was no necessity for the court to consider and answer the second and third issues. (para 45)

Case(s) referred to:

Citibank Bhd v. Pembangunan Cahaya Tulin Sdn Bhd & Ors [2012] CLJU 416; [2012] 1 LNS 416 HC ***(refd)***

Damai City Sdn Bhd v. MCC Overseas (M) Sdn Bhd [2022] CLJU 1835; [2022] 1 LNS 1835 HC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2014] 3 CLJ 441 CA ***(refd)***

Euroland & Development Sdn Bhd v. Tack Yap Construction (M) Sdn Bhd [2018] CLJU 896; [2018] 1 LNS 896 HC ***(refd)***

Granstep Development Sdn Bhd v. Tan Chong Heng Construction Sdn Bhd [2022] CLJU 251; [2022] 1 LNS 251 HC ***(refd)***

Gumi Asli Elektrikal Sdn Bhd v. Dazzling Electrical (M) Sdn Bhd & Another Case [2020] CLJU 189; [2020] 1 LNS 189 HC ***(refd)***

Kembang Serantau Sdn Bhd v. YBK Usahasama Sdn Bhd [2018] CLJU 206; [2018] 1 LNS 206 HC ***(refd)***

KPF Niaga Sdn Bhd v. Vigour Builders Sdn Bhd & Another Case [2021] CLJU 141; [2021] 1 LNS 141 HC ***(refd)***

Lau Keen Fai v. Lim Ban Kay & Anor [2012] 1 CLJ 569 FC ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Liew Piang Voon v. WLT Project Management Sdn Bhd [2020] CLJU 1105; [2020] 1 LNS 1105 HC ***(refd)***

Macly Equity Sdn Bhd v. Prestij Mega Construction Sdn Bhd [2021] CLJU 366; [2021] 1 LNS 366 HC ***(refd)***

Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2019] 8 CLJ 433 FC ***(refd)***

Mentmore Towers Ltd & Ors v. Packman Lucas Ltd [2010] EWHC 457 ***(refd)***
Pacific & Orient Insurance Co Bhd v. Thayamal M Raman & Ors [2013] CLJU 456; [2013] 1 LNS 456 HC ***(refd)***
Protasco Bhd v. Tey Por Yee & Anor And Other Appeals [2021] 9 CLJ 349 FC ***(refd)***
SG South Ltd v. King's Head Cirencester LLP And Another [2009] EWHC 2645 ***(refd)***
Tekun Cemerlang Sdn Bhd v. Vinci Construction Grands Projets Sdn Bhd [2021] 6 CLJ 779 HC ***(refd)***
UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case [2015] 5 CLJ 527 HC ***(refd)***
View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC ***(refd)***
Wijaya Gemilang Trading Sdn Bhd v. Crec Geotechnical Engineering (M) Sdn Bhd [2020] MLJU 1021 ***(refd)***

Legislation referred to:
Construction Industry Payment and Adjudication Act 2012, ss. 12(2)(a), 15(a), 16(1)(b), 37(1)
Courts of Judicature Act 1964, ss. 25, 35
Evidence Act 1950, ss. 101, 102
Rules of Court 2012, O. 92 r. 4

Other source(s) referred to:
Julian Bailey, Informa Law from Routledge, Construction Law, 2nd edn, 2016, p 15

For the plaintiffs - Suria Juan Pillai & Sajitha Suresh; M/s Selva Mookiah & Assocs
For the defendant - Terence Loh & Georgina Lim; M/s Belden

Reported by S Barathi

JUDGMENT

Aliza Sulaiman J:

Introduction

[1] There were two applications by the plaintiff.

[2] In the first application (encl. 1) pursuant to ss. 25 and 35 of the Courts of Judicature Act 1964 (Act 91) ('CJA 1964') and O. 92, r. 4 of the Rules of Court 2012 ('RC 2012'), the plaintiff prayed for, among others:

(i) a declaration that:

(a) the reference of dispute to adjudication by the defendant by way of notice of adjudication dated 28 September 2022 ('notice of adjudication') and registered as AIAC/D/ADJ-4498-2022 ('adjudication proceedings') is unreasonable, oppressive and/or an abuse of process;

(b) the adjudicator appointed in the adjudication proceedings pursuant to the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') does not have jurisdiction to hear and decide the dispute described in the notice of adjudication; and

A (c) the adjudication proceedings commenced by the defendant against the plaintiff pursuant to the CIPAA are null and void; and

(ii) an order that:

(a) any decision rendered by the adjudicator be declared as invalid and
B unenforceable;

(b) the notice of adjudication issued by the defendant to the plaintiff be set aside; and

(c) the adjudication proceedings be stayed pending the full and final
C disposal of the originating summons ('OS').

[3] In the second application, which was made pursuant to the same provisions of the CJA 1964 and RC 2012 (encl. 2), the plaintiff sought an order which is the same as sub-para. 2(ii)(c) above.

[4] On 11 April 2023, the plaintiff made an oral application for an
D *ad interim* order to stay the adjudication proceedings pending the final disposal of encl. 2.

[5] This application was allowed on 13 April 2023, whereby it was ordered that the adjudication proceedings be stayed pending the final disposal
E of encls. 1 and 2.

[6] After having considered the cause papers and the oral and written submissions of the parties, I had dismissed the plaintiff's applications in encls. 1 and 2.

[7] The plaintiff is dissatisfied with the decision and is pursuing its right
F of appeal. My full reasonings for the decision are elaborated in the succeeding part of this judgment.

The Cause Papers

[8] The cause papers apart from encls. 1 and 2 are as follows:

G (i) the plaintiff's affidavit in support ('AIS') affirmed by its director, Kwan Joon Hoe on 6 April 2023 (encl. 4);

(ii) the defendant's affidavit in reply ('AIR') affirmed by its construction manager, Li Zhengyin on 23 April 2023 (encl. 23);

H (iii) the defendant's notice of intention to use the affidavit in encl. 17 (encl. 24);

(iv) the plaintiff's AIR affirmed by the same deponent on 12 May 2023 (encl. 25);

I (v) the defendant's supplementary affidavit affirmed by the same deponent on 23 May 2023 (encl. 31);

(vi) the plaintiff's affidavit in reply no. 2 affirmed by the same deponent on 31 May 2023 (encl. 34); and

(vii) the plaintiff's additional affidavit affirmed by the same deponent on 19 June 2023 (encl. 47).

Background Facts

[9] The plaintiff is a private limited company incorporated under the laws of Malaysia with a registered address at Level 33A, Menara NU2, No. 203, Jalan Tun Sambanthan, Kuala Lumpur Sentral, 50470 Kuala Lumpur. Its nature of business is the provision of engineering and construction services and investment holding.

[10] The defendant is a private limited company incorporated under the laws of Malaysia and its registered address is at Suite 9-13A, Level 9, Wisma UOA II, Jalan Pinang, 50450 Kuala Lumpur. Its business address is Suite A-13A-2, Level 13A, Hampshire Place Office, 157 Hampshire, No. 1, Jalan Mayang Sari, 50450 Kuala Lumpur. Its nature of business is as a contractor for construction works.

[11] The plaintiff was employed by MRCB Seputeh Land Sdn Bhd ('MRCB Land') as the main contractor for the project known as:

Cadangan Pembangunan Bercampur Parcel C Yang Mengandungi:-

Fasa 1:

(i) 8 Tingkat Ruang Tempat Letak Kereta, Ruang Perniagaan (51 Unit) Serta Kemudahan Dan 2 Tingkat Besmen Tempat Letak Kereta

(ii) Pangsapuri Blok C 36 Tingkat Dan Blok D 34 Tingkat (412 Unit) Di Atas 8 Tingkat Ruang Tempat Letak Kereta, Ruang Perniagaan Serta Kemudahan Dan 2 Tingkat Besmen Tempat Letak Kereta

(iii) 1 Unit Pencawang Pembahagian Utama (PPU)

Fasa 2:

(i) Pangsapuri Blok A 36 Tingkat Dan Blok B 34 Tingkat (412 Unit) Di Atas 8 Tingkat Ruang Tempat Letak Kereta, Ruang Perniagaan Serta Kemudahan Dan 2 Tingkat Besmen Tempat Letak Kereta

(ii) 12 Tingkat SOHO (287 Unit) Di Atas 3 Tingkat Ruang Perniagaan Serta Kemudahan Dan 2 Tingkat Besmen Tempat Letak Kereta

Di Atas PT 68, PT 69, PT 70, PT 71, PT 75 (Lot Lama Di Sebahagian Lot 240 Dan Lot 241), Seksyen 98, Bandar Kuala Lumpur Serta PT 8617 (Lot Lama Lot 4441), Mukim Kuala Lumpur, Bandaraya Kuala Lumpur' ('Project').

[12] By the letter of award dated 20 November 2015, the plaintiff appointed the defendant as the works package contractor for the main building works package for the project for the contract sum of RM419,336,000.

[13] According to the bill of quantities ('BQ') under the works package contract, among the defendant's responsibility was to install façade windows for the units in the project ('façade window works'). The façade window works include the installation of sub-frames ('sub-frame works').

[14] In the course of carrying out the works, the defendant had submitted various progress claims to the plaintiff, including progress claims ('PC') No. 17 to No. 38, claiming for, among others, amounts due and owing for the completion of the façade window works and the sub-frame works ('progress claims').

[15] The architect or quantity surveyor ('QS') of the project had approved the progress claims. The architect for the project is Veritas and the QS is JUBM Sdn Bhd ('JUBM').

[16] By way of interim payment certificates ('IPC') No. 17 to No. 38, the plaintiff remitted various sums to the defendant as consideration for, among others, the façade window works and sub-frame works which were purportedly completed by the defendant.

[17] On 11 April 2019, the plaintiff issued the certificate of practical completion ('CPC') certifying that the works were completed to the plaintiff's satisfaction. Accordingly, possession was granted on 20 March 2019.

[18] After vacant possession was handed over to the unit owners, the following events occurred:

(i) MRCB Land appointed Architect Centre Sdn Bhd ('ACSB') to conduct an initial building condition inspection and technical advisory on the project after its completion. The following finding was made in the "Building Condition Inspection Report & Advisory" dated 5 March 2020 by ACSB in relation to the sub-frame works ('first ACSB report'):

> **Unless design intended, 'sub-frame' (or plaster guide) is not sighted from the Approved Aluminium frame shop drawing**. A clarification should be sought to determine whether is there any sub-frame installed at site. It is a common practice to have the sub-frame to determine the window opening as plaster guide.
>
> (emphasis added)

(ii) around the same time, multiple complaints by the unit owners were lodged with MRCB Land for various defects in relation to the works carried out by the defendant in the project, which among others, include

water leakage from their unit windows ('complaints'). MRCB Land informed the plaintiff of the complaints and requested the plaintiff to resolve the issues raised in the complaints;

(iii) thereafter, the plaintiff instructed the defendant to conduct rectification works to resolve the issues raised in the complaints. The defendant proceeded to do so;

(iv) however, the water leakage issue persisted and the unit owners continued to lodge complaints with MRCB Land. This led MRCB Land to appoint third-party contractors to resolve the problem but apparently, the water leakage could not be resolved as it is a recurring defect;

(v) ACSB then conducted another and more detailed inspection to determine the cause of the persistent water leakage issue, and in its 'Building Condition Inspection Report And Technical Advisory' dated 10 May 2022 ('second ACSB report'), it was found that there were no sub-frames to the façade windows.

[19] On 9 September 2022, the defendant initiated the adjudication proceedings against the plaintiff for the following claims:

(i) the release of the first moiety of the retention sum, *ie*, RM7,959,872.06 pursuant to the issuance of the CPC on 11 April 2019; and

(ii) the non-certification and under-certification of value of works done under the contract, which, among others, include the failure or refusal to measure or re-measure provisional quantities, prime cost items, provisional sums and variation works done in the sum of RM52,559,215.11 under IPC No. 38 dated 4 November 2020 for the period ending 30 September 2020.

[20] The plaintiff alleged that the defendant continued to ignore the issues pertaining to the window sub-frames, and when the adjudication proceedings reached an advanced stage, the plaintiff realised that the defendant had no *bona fide* intention to address these issues but was only seeking to use the adjudication proceedings to further its fraud and extract monies from the plaintiff.

[21] This led to the filing of Kuala Lumpur High Court Civil Suit No: WA-22NCvC-125-03-2023 ('Suit 125', which was subsequently registered in the construction court as Civil Suit No: WA-22C-33-05-2023) by the plaintiff against the defendant and its directors and project managers. Except for one of the defendant's directors, the other individual defendants in Suit 125, all of whom are foreigners, are purportedly no longer in the defendant's employment.

[22] Suit 125 was filed premised on fraud and conspiracy, *viz*, the fraudulent or false claims for sub-frame works that were not carried out by the defendant, which has the effect of questioning the veracity of the progress claims.

[23] The plaintiff filed an application to appoint an independent court expert to determine the accuracy and veracity of the progress claims and their certification ('expert application').

[24] In the adjudication proceedings, Mr Liow Si Khoon was appointed as the adjudicator to hear and determine the dispute between the parties. He was statutorily obliged to deliver his decision by 2 May 2023 in accordance with para. 12(2)(a) of the CIPAA. However, the plaintiff filed the applications in encls. 1 and 2 on 6 April 2023.

[25] On 31 May 2023, Lim Jit Fung, the Director of JUBM Asia Sdn Bhd and duly authorised by JUBM, had affirmed a declaration on behalf of JUBM (see exh. "P-20", encl. 34) under the Statutory Declarations Act 1960 (Revised 2016) (Act 783) as follows:

> ...
>
> 3. JUBM, being the QS in the Project, prepared the bill of quantities and tender documents based on the consultants' designs, one of which is the Architect of the Project, Messrs Veritas Architects Sdn Bhd ("the Architect").
>
> 4. To the best of JUBM's knowledge, the bill of quantities and tender documents as well as other contract documents contains a requirement for sub-frames to be installed to the windows in the Project. This includes for Apartment Towers A to D as well as the SOHO units.
>
> 5. JUBM also measured and valued certified works completed by China State Construction Engineering (M) Sdn Bhd ("China State").
>
> 6. During the joint site inspection for the window works, JUBM relied on the architect's confirmation in respect of the completion of the window works. In reliance of this, we issued the valuation and/or certification in respect of China State's works.
>
> 7. It recently came to our attention that China State may not have installed the sub-frames to the windows in the Project.
>
> 8. As the evaluation and/or assessment by the Architect for several progress claims had included completed window works, such evaluation and/or assessment may be unreliable. As a result, a re-evaluation and/or re-assessment of the progress claims and the related interim payment certificates would be appropriate.

[26] On 15 June 2023, Azril Amir bin Jaafar, the Director of Veritas and duly authorised by Veritas, had affirmed a declaration on behalf of Veritas under Act 783 (see exh. "P-22", encl. 47) stating, among others, that Veritas'

scope of works in the project includes approving the shop drawings prepared by the defendant and statements which are similar to paras. 4, 7 and 8 of JUBM's statutory declaration ('SD'). Veritas additionally declared that:

> 8. These admissions by Veritas, when read together with other contemporaneous documents/evidence, would show that the defendant had committed fraud in claiming for the Sub-Frame Works despite not carrying out the same.
>
> 9. I am further advised by the plaintiff's solicitors and respectfully state that Veritas' admissions contained in the SD would have the effect of questioning the certification process of Progress Claim No. 38 and Interim Payment Certificate No. 38, which is the subject matter of the adjudication proceedings and the basis of the adjudicator's jurisdiction.

Preliminary Issue

[27] A preliminary issue which arose in the course of the hearing was whether the court has the power to prohibit the progress of the adjudication proceedings by a stay or setting aside the same on jurisdictional grounds, or on the ground that it was brought unreasonably and oppressively.

[28] The plaintiff's counsel relied on the judgments in *Tekun Cemerlang Sdn Bhd v. Vinci Construction Grands Projets Sdn Bhd* [2021] 6 CLJ 779; *Mentmore Towers Ltd And Others v. Packman Lucas Ltd* [2010] EWHC 457 and *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22 to support the submission that the High Court has supervisory jurisdiction over adjudication tribunals under the CIPAA and that jurisdictional challenges can be made at any point in time.

[29] On the other hand, the defendant contended that the filing of the OS is premature because the adjudication decision ('AD') has not been delivered yet and the plaintiff's entire premise in the OS is predicated on the presumption that the defendant's claim in the adjudication proceedings will be allowed and the plaintiff's set-off will be dismissed.

[30] The defendant referred to paras. 227 and 228 of the plaintiff's adjudication response in submitting that the plaintiff had relied on the first ACSB report and second ACSB report in characterising the issue arising from the façade window wall works, including the non-installation of façade window sub-frames, as defective or non-conformance of works and raised the cost of rectification as a set-off against the defendant's claim.

[31] Mr Terence Loh argued for the defendant that the plaintiff has taken an inconsistent position in the adjudication proceedings and in the OS premised on the same evidence. The learned counsel further argued that the corollary that must follow is that the adjudication proceedings initiated by the defendant cannot be said to be an instrument of fraud.

[32] The jurisdiction of the court to grant declaratory and injunctive reliefs are statutorily provided and the court also has the inherent jurisdiction to make such orders (see the discussion on the second issue in *Damai City Sdn Bhd v. MCC Overseas (M) Sdn Bhd* [2022] CLJU 1835; [2022] 1 LNS 1835; [2022] MLRHU 1584 at paras. 52-54).

[33] Court intervention while an adjudication proceeding is underway is rare and must be sparingly entertained lest it will encourage the opening of floodgates to frustrate or defeat the utility of statutory adjudication as a swift remedy for unpaid parties in the construction industry (see *Liew Piang Voon v. WLT Project Management Sdn Bhd* [2020] CLJU 1105; [2020] 1 LNS 1105; [2020] MLJU 1431; see too, *Euroland & Development Sdn Bhd v. Tack Yap Construction (M) Sdn Bhd* [2018] CLJU 896; [2018] 1 LNS 896; [2018] MLJU 861 and *Granstep Development Sdn Bhd v. Tan Chong Heng Construction Sdn Bhd* [2022] CLJU 251; [2022] 1 LNS 251; [2022] MLJU 202 at para. 26).

[34] Therefore, the short answer to the preliminary issue is "Yes", provided that a plaintiff is able to discharge the burden of proving the grounds in support of the application and the court, in the exercise of its discretion, is minded to grant declaratory or injunctive relief to the plaintiff under the CJA 1964 or the Specific Relief Act 1950 (Act 137).

Principal Issues

[35] The plaintiff has identified three questions to be determined by the court, namely:

(i) whether the adjudication proceedings was initiated by the defendant in furtherance of a fraud, thereby being oppressive and an abuse of process;

(ii) whether the adjudication proceedings is unreasonable in view of the fact that the AD arising out of it is likely to be set aside under s. 15(a) of the CIPAA or stayed under para. 16(1)(b) of the CIPAA pending disposal of Suit 125; and

(iii) whether the adjudicator has no jurisdiction to determine the adjudication proceedings, in view of the alleged fraud, Suit 125, the expert application and the SD by the QS, which has the effect of questioning the integrity of the certification process of PC No. 38 and IPC No. 38.

Analysis And Findings Of The Court

First Issue: Whether The Adjudication Proceedings Is Initiated By CSCE In Furtherance Of A Fraud, Thereby Being Oppressive And An Abuse Of Process

[36] The plaintiff submitted that the defendant has a contractual obligation to install sub-frames to the windows for Towers A to D and SOHO units of the project. This is based on the following contemporaneous contractual documents:

(i) tender drawings;

(ii) contract drawings;

(iii) construction drawings; and

(iv) the BQ.

[37] The plaintiff highlighted that the tender drawings, contract drawings and construction drawings contain, among others, the following general note:

> ...
>
> (16) All doors and windows facing outdoor at level 9 and above (towers and SOHO) complete with multipoint handle/lock, wetherstrip, **associated sub frames** and necessary fixing hardware to manufs detail.
>
> (emphasis added)

and the BQ contains the following specification:

> Powder coated aluminium framed window; 1.5 mm thick powder coated (60 micron) with dark grey finish; complete with external vertical frame capping; colour dark grey and white to Architect's selection, heads, jambs, mullions, transoms, sills, **sub-frames**, glazing beads coupling, ... and all other accessories; including fabrications and fixing to surrounds, grouting frames and pointing with sealants; (glass measured separately); all as showns in Architectural Drawings No. 11-009/GL/TD/35-0102
>
> (emphasis added)

[38] While the plaintiff acknowledged that the issue of whether the defendant has committed fraud or otherwise is to be determined in Suit 125, for purposes of the instant applications, it was submitted that there is a *prima facie* case of fraud committed by the defendant in claiming and receiving payment for the installation of sub-frames when it did not carry out the same.

[39] The plaintiff relied on the following to support its allegation of fraud by the defendant:

(i) the finding in the first ACSB report as quoted earlier whereby the shop drawings do not show that sub-frames were installed to the windows although it is a common practice to install the same.

(ii) the second ACSB report, which found that sub-frames were in fact not installed to the windows, despite it being part of the contract specification:

> Building Condition Inspection Report & Advisory
>
> 1. Findings from Document Study and Conditions observed to
>
> Facade, Curtain wailing and window
>
> Significant ANOMALIES between Contract Specification/ Requirement against As-built Condition are summarized below:

Item	DESCRIPTION (Extracted from Document 'Fagade Performance Specification Curtain Wall and Miscellaneous Cladding dated 9 Oct 2014)	REMARKS
1.03	THE SPECIALISTS SCOPE OF WORK IN SPECIFICATION CONTRACT	
A.5	Design, supply, fabrication and installation of aluminium window system with tempered/ laminated glass including glazing, extruded aluminium mullion, transoms, aluminium subframe, trims, gaskets, sealants, hot dip galvanized embed achors, flashings, hot dip galvanized steel bracket, stainless steel grade 304 screw and *etc*.	Non - compliant. - No aluminium subframe observed. - Corrosion observed to fastener.

(iii) the defendant's admission in para. 7 of its AIR (encl. 23) that "... the approved design and shop drawings by the architect and the plaintiff for windows work at the façade and/or windows of Towers A to D of the condominium and SOHO units for the project did not require sub-frame to be installed. Accordingly, the defendant did not install sub-frames on the windows of Towers A to D of the condominium and SOHO units."

(iv) although the progress claims submitted by the defendant did not contain a specific claim for the sub-frame works, the plaintiff's counsel invited the court to compare the prices in the BQ and PC No. 38 for "windows" wherein it is evident that the prices in the progress claims are identical to the prices in the BQ, which includes prices for the sub-frame works. In other words, the progress claims submitted by the defendant were as per the contract price. If the defendant did not make a claim for the sub-frame works, there would be a price markdown that can be observed from the progress claims when compared to the BQ, which is not the case here. In making a claim for the façade window works, the defendant omitted the detailed description as present in the BQ, which contains, among others, the word "sub-frame".

(v) as the IPC are based on the progress claims, it follows that any payment made or ought to be made by the plaintiff includes payment for the sub-frame works (see for example, IPC No. 38).

(vi) despite conducting the alleged rectification works, the defendant did not inform the plaintiff that the water leakage from the unit windows was actually caused by the lack of sub-frames to the windows. The

defendant constantly and continuously led the plaintiff to believe that it will take steps to rectify the water leakage issue during meetings held between the parties, thus leading the plaintiff to believe that the water leakage is nothing but an ordinary construction defect that could be rectified.

(vii) the shop drawings are inconsistent and contradictory to the previous contractual documents. The defendant had prepared the shop drawings with the hindsight of supporting its fraudulent acts and omissions.

(viii) the statutory declaration by the QS of the project as quoted previously.

(ix) the defendant initiated the adjudication proceedings against the plaintiff and this shows that the defendant's engagement with the plaintiff, purportedly seeking to discuss the plaintiff's grievances and various issues, was nothing but an attempt to *bide* time and steer the plaintiff away from the fact that the defendant had committed fraud. The defendant is exploiting the speedy nature of the adjudication proceedings to prevent the plaintiff from taking action against the defendant's fraud.

[40] The burden of proof is, of course, on the plaintiff to establish its allegation of fraud on a balance of probabilities and to adduce evidence to support its averments (see ss. 101 and 102 of the Evidence Act 1950 (Act 56) and *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697).

[41] I have considered the parties' affirmations, exhibits and submissions and in my view, the plaintiff has not established its allegation of fraud on the balance of probabilities for the following reasons:

(i) clause 7 of the LoA provides that the design of the works must be to the full satisfaction and approval of the plaintiff and/or MRCB Land. The said clause reads as follows:

> 7. Design and Associated Liabilities of the Works Package Contractor (If Applicable)
>
> 7. 1 The Works Package Contractor undertakes and agrees that it shall be fully responsible for the design, in particular its functional adequacy, structural integrity, safety and complying with performance specifications and shall indemnify and hold harmless the Main Contractor to the fullest extent in law, from and against any design defects or inadequacies notwithstanding the approval of any particular design by the Main Contractor. Notwithstanding anything to the contrary, the design of the Works must be to the full satisfaction and approval of the Main Contractor and/or the Employer of the Project.

(ii) although the "general notes" in the initial architectural drawings denote that all doors and windows at Level 9 and above are to be with sub-frames, the same general notes also require the defendant to submit the detailed shop drawings for the approval of Veritas Architects Sdn Bhd ('Veritas') *viz*:

> (14) Contractor to submit all aluminium frame, curtain wall, door and window shop drawings with specialist detail for arch's approval.

This requirement for the defendant to carry out the façade window works in accordance to the architect's approved shop drawings is also expressly provided in the BQ for façade window curtain wall for Towers A to D, for example, in the BQ for Tower C:

> all in accordance with Architect's approval and shop drawings submission, as per drawing no. 11-009/GL/TD/35-0309/T01.

The shop drawings for the façade window curtain wall works were approved by the plaintiff and the architect for construction without sub-frames, for example, for Towers A and B, see exh. "LZ-1" encl. 23 and for Towers C and D, see exh. "LZ-2", encl. 23 wherein the plaintiff's named representative has checked, signed and dated the "material/sample shop drawing submission form" and veritas has approved and signed the same and ticked the status box as "work may proceed, subject to incorporation of comments, revise & resubmit".

The defendant is contractually required to carry out the façade windows works in accordance with the shop drawings as forwarded by the plaintiff to Veritas for approval and comments and approved by Veritas. In *Construction Law*, 2nd edn, Informa Law from Routledge, 2016 by Julian Bailey, the learned author explained at p. 152 that:

> 3.29 A contractor's drawings, when submitted as part of the tender process or even after the contract is entered into, may set out the scope of the contractor's work. Drawings may be in any format the parties so choose (*eg*, paper, electronic or both). *Where a contract requires the contractor to perform its work in accordance with drawings that are to be developed and approved after the date of the contract, once the final drawings are developed, those are the drawings to which the contractor must work* ...

(emphasis added; see too, *Wijaya Gemilang Trading Sdn Bhd v. Crec Geotechnical Engineering (M) Sdn Bhd* [2020] MLJU 1021 and *Kembang Serantau Sdn Bhd v. YBK Usahasama Sdn Bhd* [2018] CLJU 206; [2018] 1 LNS 206; [2017] MLJU 2165 at paras. 120 and 126).

Even the "condition and findings" in the second ACSB report make reference to the specifications in the approved shop drawings and that certain works did not comply with the approved shop drawings. In

addition, based on the "other observations and concerns" in the second ACSB report, the cause of the water leakage is not exclusively due to the absence of sub-frames, but rather several factors such as workmanship and the choice of materials. A

As the plaintiff itself had checked the shop drawings and Veritas had approved the same without installation of sub-frames to the façade windows, the plaintiff's contention that the defendant prepared the shop drawings with the hindsight of supporting the defendant's fraudulent acts is illogical and I am unable to accept this argument. B

(iii) the CPC was issued by the plaintiff to the defendant on 11 April 2019. By this act, the plaintiff certified that the façade windows were installed in accordance with the approved shop drawings and were completed to its satisfaction. C

(iv) in Interim PC Nos. 17, 27, 32 and 38, the defendant did not claim for any sub-frame works for the façade windows in Towers A to D. D

(v) as alluded to under the preliminary issue, the non-installation of window sub-frames was never raised as an issue of fraud in the adjudication proceedings. Instead, the plaintiff characterised the issue of the façade window wall works, including the non-installation of façade window sub-frames, as defective or non-conformance works and raised the costs of rectification as a set-off against the plaintiff's claim. Furthermore, the plaintiff relied on the same documentary evidence, namely the first ACSB report and the second ACSB report. The former covers, among others, "water seepage through aluminium framed windows" while the latter addressed, *inter alia*, "defective and workmanship issues with the installation of aluminium framed window at individual units" and "water seepage and/or leakages at individual units". E F

It is incredulous for the plaintiff to claim the water seepage issue as a defect before the adjudicator and as fraud before this court. In failing to raise the alleged fraud in the adjudication proceedings, it is an afterthought on the part of the plaintiff to do so now in this court. If the court were to allow the instant applications, the court would be endorsing two wholly different and contradictory defence in the adjudication proceedings and in this court, mounted on the same subject matter, *ie*, the non-installation of sub-frames to the façade windows. G H

(vi) the defendant has other claims in the adjudication proceedings. The alleged fraud only concerns the façade window sub-frames and should not affect the validity of the other claims in the adjudication proceedings. The defendant's claims are in essence a final claim for value of works done for the project, an integrated development consisting of commercial, retail and private parcels otherwise known as I

A the VIVO Residential Suites @ 9 Seputeh Condominium. Based on the adjudication claim, the amount for window works is only RM15,405 (see item 33, schedule 3(a) – third table at p. 298, encl. 4) as compared to the total sum claimed of RM59,673,097.83 (see the summary which is tabulated at pp. 283 and 284, encl. 4). In my considered view, it B would be unjust for this court to grant the declarations as sought by the plaintiff in encl. 1 when the defendant has raised many other issues and claims, as evident in the adjudication claim.

(vii) with regards to the plaintiff's reliance on the SDs and the submission that the defendant did not file any affidavit to rebut the allegations in the C SDs, I was persuaded by the defendant's argument that the content of the SDs is hearsay evidence and the truth or otherwise of the statements in the SDs was not tested. Furthermore, the SDs are highly prejudicial to the defendant (see *Dato' Seri Anwar Ibrahim v. PP* [2014] 3 CLJ 441; [2014] 3 MLJ 882; *Pacific & Orient Insurance Co Bhd v. Thayamal M* D *Raman & Ors* [2013] CLJU 456; [2013] 1 LNS 456; [2014] 7 MLJ 18 and *Citibank Bhd v. Pembangunan Cahaya Tulin Sdn Bhd & Ors* [2012] CLJU 416; [2012] 1 LNS 416; [2012] 9 MLJ 181). Therefore, the SDs are not admissible as evidence and assuming that I am wrong on this point, minimal weight is given to the SDs because no contemporaneous E documents were tendered to support the statements in the SDs; the statements were not made contemporaneously with the occurrence or existence of the facts stated; and the statements are not subject to cross-examination. To be clear, the defendant's submissions regarding the issue of the SDs involve questions of law and the fact that the defendant did not affirm any affidavit to challenge the SDs is of no consequence.

F

[42] In addition, I find that the defendant had submitted other compelling reasons to support a finding in its favour, which are as follows:

(i) the adjudication proceedings is an exercise of a statutory right conferred by the CIPAA as envisaged by Parliament (see *Martego Sdn Bhd* G *v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2019] 8 CLJ 433; [2020] 6 MLJ 224). In this regard, the courts have taken a cautious approach and is slow to interfere with adjudication proceedings as it is an exercise of the parties' statutory right. This is more obvious in this case where the AD has yet to be delivered. In *Macly Equity Sdn Bhd* H *v. Prestij Mega Construction Sdn Bhd* [2021] CLJU 366; [2021] 1 LNS 366; [2021] MLJU 537, Lim Chong Fong J (as His Lordship then was) said:

> [25] I must therefore ensure that the objects of the CIPAA are not thwarted by unfairly restraining parties off the starting block of the I statutory adjudication to have their disputes resolved swiftly. This is a policy consideration to avoid and discourage non paying parties stifling statutory adjudication initiated by unpaid parties.

(ii) a specific remedy for fraud is provided for in s. 15(a) of the CIPAA where, in the event the plaintiff is aggrieved by the outcome of the adjudication proceedings, it may apply to set aside the AD on the ground that the AD was improperly procured through fraud (see *SG South Ltd v. King's Head Cirencester LLP And Another* [2009] EWHC 2645 (TCC); *Gumi Asli Elektrikal Sdn Bhd v. Dazzling Electrical (M) Sdn Bhd & Another Case* [2020] CLJU 189; [2020] 1 LNS 189 and *KPF Niaga Sdn Bhd v. Vigour Builders Sdn Bhd & Another Case* [2021] CLJU 141; [2021] 1 LNS 141; [2021] MLJU 229).

The plaintiff has cited provisions in the CJA 1964 and the RC 2012 in its applications. These are general legislations. It is trite that where a special provision is enacted, that special provision excludes the operation of a general legislation (see *Lau Keen Fai v. Lim Ban Kay & Anor* [2012] 1 CLJ 569; [2012] 2 MLJ 8 and *Protasco Bhd v. Tey Por Yee & Anor And Other Appeals* [2021] 9 CLJ 349; [2021] 6 MLJ 1).

The purpose and objective of the CIPAA have been explicated in numerous case authorities since the CIPAA came into operation (see, among others, *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case* [2015] 5 CLJ 527; [2015] 11 MLJ 499 and *Martego*'s case (*supra*). If respondents in adjudication proceedings which are pending are allowed to easily resort to general statutory provisions to circumvent or suspend the process of adjudication instead of relying on the specific remedies provided under the CIPAA, except in a clear case of absolute lack of jurisdiction, this will defeat the purpose of the ClPAA in providing a speedy mechanism for settling payment problems in construction contracts even if this may be on a provisional interim basis.

In *Liew Piang Voon v. WLT Project Management Sdn Bhd* [2020] CLJU 1105; [2020] 1 LNS 1105; [2020] MLJU 1431, the court said:

> [20] I have in *Multazam Development Sdn Bhd v. Felda Global Ventures Plantations (M) Sdn Bhd* [2020] 6 AMR 258 stated that the extent of court intervention in statutory adjudication under the CIPAA is limited. The permissible court interventions including challenges on jurisdiction have been expressly prescribed in the statute and these challenges are only available after the adjudication decision has been made.

I am in agreement with the defendant that court intervention to halt and terminate the adjudication proceedings before the delivery of the AD must be sparingly entertained and this is certainly one such case.

(iii) as regards the plaintiff's submission that the plaintiff's application in encl. 1 has rendered the adjudication proceedings academic as there could be a risk of inconsistent findings being made by the adjudicator and this court and that the accuracy and veracity of the progress claims and IPC can only be determined in Suit 125, sub-s. 37(1) of the CIPAA provides that a dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court.

(iv) although the plaintiff discovered the defendant's purported fraud since the second ACSB report dated 10 May 2022, the plaintiff did not make any allegation of fraud against the defendant or take any legal action. Even when the defendant commenced the adjudication proceedings, the plaintiff did not raise the issue of fraud and instead, the plaintiff referred to the second ACSB report and asserted that the façade window works were defective works. The allegation of fraud was raised in this suit, 11 months after the purported discovery of fraud, and less than one month prior to the due date for the delivery of the AD.

Second Issue: Whether The Adjudication Proceedings Is Unreasonable In View Of The Fact That The AD Arising Out Of It Is Likely To Be Set Aside Under Section 15(a) Of The CIPAA Or Stayed Under Paragraph 16(1)(b) Of The CIPAA Pending The Disposal Of Suit 125

Third Issue: Whether The Adjudicator Has No Jurisdiction To Determine The Adjudication Proceedings, In View Of The Fraud, Suit 125, The Expert Application And The SD By The QS & Architect, Which Has The Effect Of Questioning The Integrity Of The Certification Process Of PC No. 38 And IPC No. 38

[43] In respect of the second issue, the plaintiff took the position that the adjudication proceedings have been tainted with fraud and therefore, its decision is likely to be set aside under s. 15(a) of the CIPAA. To continue with the prosecution of the adjudication proceedings in these circumstances would be a waste of time and the parties would incur abortive costs.

[44] With regards to the third issue, the plaintiff asserted that the progress claims and IPC have lost their ability to be enforced as the integrity of the certification process has been put to question by the alleged fraud, the expert application in Suit 125 and the SD by the QS. The adjudicator having derived his jurisdiction from the payment claim and payment response, which centres around IPC No. 38, has lost his jurisdiction as IPC No. 38 is no longer reliable or enforceable, and could no longer be regarded as a validly issued certificate.

[45] As the second issue and third issue are predicated on a finding that the plaintiff has proven a *prima facie* case of fraud, and in the light of the findings of the court in relation to the first issue, primarily that the plaintiff's allegation of fraud has not been established, there is no necessity for the court to consider and answer the second issue and third issue.

Conclusion

[46] Based on the foregoing reasons, the plaintiff's application in encl. 2 was dismissed with costs in the cause and similarly, the plaintiff's application in encl. 1 was dismissed. The plaintiff was ordered to pay costs of RM15,000 to the defendant, subject to allocatur.